

2003-62

>>> "John F. Mills" <JFMills@wwrplaw.com> 6/1/2005 10:18 PM >>>
Please see attached.

State Bar of Michigan
Family Law Section

June 1, 2005

Via Email: MSC_clerk@courts.mi.gov
Michigan Supreme Court Clerk's Office
P.O. Box 30052
Lansing, MI 48909

Re: ADM File No. 2003-62
Proposed Adoption of new Michigan Rules of Professional Conduct

Dear Honorable Justices of the Supreme Court:

I am writing on behalf of the Family Law Section of the State Bar of Michigan. The Family Law Section (FLS) represents over 2,800 attorneys across the state. It is governed by the Family Law Council (FLC) made up of 21 attorneys from jurisdictions across Michigan. We are dedicated, in part, to representing our members and their views before the various courts in the state as well as the state legislature. We recently reviewed the proposed changes to the Michigan Rules of Professional Conduct and communicated the following comments to the Representative Assembly of the State Bar of Michigan. I am repeating those comments here for your consideration.

Rule 1.5 FEES

1.5 (d): The proposed rule says [§(d)(1), p. 18]:

"(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case." (Emphasis added).

According to the above provision, a contingent fee is prohibited with regard to a property settlement only if that settlement is "in lieu" of alimony or support. However, the Comment to Rule 1.5 says it applies to any property settlement, and also says that the rule does not apply to post-judgment collection of support or other financial orders. The related Comment [p. 20], says:

"[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained." This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

The FLC recommends clarification of the first sentence of the comment.

- delete "in lieu thereof" in §(d)(1)

- add "in connection with the recovery of post-judgment balances due under support, alimony or other financial orders.

"(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof, except in connection with the recovery of post-judgment balances due under support, alimony or other financial orders; or

(2) a contingent fee for representing a defendant in a criminal case."

The new proposed rule would read:

"(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement, except in connection with the recovery of post-judgment balances due under support, alimony or other financial orders; or

(2) a contingent fee for representing a defendant in a criminal case."

1.5 (f): The proposed rule reads:

A lawyer and a client may agree to a lump-sum or nonrefundable fee arrangement that is earned by the lawyer at the time of engagement, provided that:

(1) the complexity of the case and its likelihood of preempting the lawyer from other work is apparent to the client at the outset; and

(2) the retainer agreement is in a writing signed by the client, clearly identifies the client's expectations in hiring the lawyer, and unambiguously articulates that the lump-sum purchases something in addition to a fixed amount of lawyer hours; and

(3) the client is of sufficient intelligence, maturity, and sophistication to understand the agreement and that the fee is nonrefundable; and

(4) the lawyer in fact sets aside a block of time, turns down other cases, and marshals law firm resources in reliance on the fee agreement.

The FLC recommends that provisions 1.5(f)(1), (3), and (4) be deleted. These provisions are highly subjective and create onerous proof problems. FLC further recommends that section 1.5(f)(2) be revised to read:

1.5(f)(2) the retainer agreement is in writing signed by the client and clearly articulates that the retainer is nonrefundable.

1.3 Communication

The FLC opposes this proposed rule. The current Rule of Professional Responsibility on Communication is 1.4

1.6 Confidentiality

The FLC opposes the proposed rule and endorses the current Rule of Professional Responsibility 1.6 Confidentiality of Information.

4.3 Unrepresented Person

The FLC opposes the proposed rule and endorses the current Rule of Professional Responsibility 4.3 Dealing with an Unrepresented Person.

I trust you will take our comments in the spirit in which they are offered, that is to improve the profession and the practice of law. Please feel free to contact me if you have any questions regarding our position as set forth herein. Thank you for allowing us to comment on these proposed changes.

Very truly yours,

John F. Mills
Chairperson, Family Law Council
State Bar of Michigan